

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109

**REPLY COMMENTS OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

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SUMMARY

The New Jersey Division of Rate Counsel (“Rate Counsel”) has been a long-time advocate of comprehensive reform to the nation’s fragmented intercarrier compensation system and the nation’s inefficient and burdensome high cost program. Rate Counsel therefore urges the Federal Communications Commission (“FCC” or “Commission”) to adopt reform without further delay. In no event, however, should the FCC meet the challenges of so doing by raising the subscriber line charge (“SLC”), particularly in light of the fact that the existing federal accounting methodology is flawed, and, among things, fails to allocate sufficient common plant to unregulated services.

As the FCC establishes the new Connect America Fund (“CAF”), it should put into place robust measures for accountability to ensure that consumers are not being overcharged through the universal service fund assessment for the nation’s progress in achieving affordable broadband service. The purpose of universal service is to benefit consumers, not to provide an open-ended source of funding for carriers. A procurement system, modeled on existing government procurement mechanisms, is preferable to the complex reverse auction described in the FCC’s notice of proposed rulemaking.

In considering the need for subsidies, the FCC should take into account *all* revenues, whether regulated or unregulated. Furthermore, a CAF recipient should be required to provide access to wholesale broadband capabilities at reasonable rates, terms, and conditions; to provide broadband services in a manner consistent with an open Internet; and to provide broadband service on a standalone basis. Furthermore, the FCC should establish unambiguous rules and

policies that not only permit but also encourage municipalities to receive CAF subsidies so that broadband services will be brought to unserved and underserved regions in the country.

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**REPLY COMMENTS OF
THE NEW JERSEY DIVISION OF RATE COUNSEL**

I. INTRODUCTION

The New Jersey Division of Rate Counsel (“Rate Counsel”) hereby replies to comments¹ regarding the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (“NPRM”) issued by the Federal Communications Commission (“FCC” or “Commission”)

¹ / *Federal Register*, Vol. 76, No. 41, March 2, 2011, at 11632. Rate Counsel submitted initial and reply comments on Section XV of the NPRM on April 1, 2011 and April 18, 2011, respectively, and submitted initial comments on the remaining issues in separate comments on April 18, 2011.

seeking input on the transformation of the Universal Service Fund (“USF”) and intercarrier compensation (“ICC”) regime.² Numerous initial comments were submitted, and Rate Counsel does not attempt to reply to all of the many filings, but instead responds to certain key matters that were raised. As Rate Counsel explains in its initial comments, Rate Counsel has already addressed many of these issues at length in comments that have been filed in other FCC comment cycles concerning intercarrier compensation, high cost funds, and broadband deployment, and therefore Rate Counsel does not attempt to repeat all of its previous positions and analyses in these reply comments.

II. OVERVIEW

The diversity and volume of comments submitted in this proceeding underscore the complexity and high stakes of the issues that the FCC seeks to address with its proposed reforms. The matters that the NPRM encompasses have been percolating before the FCC for many years and encompass such critical issues as the overdue reform of an inefficient high cost support system that burdens consumers; the importance of spurring affordable, universal broadband deployment and subscription; intercarrier compensation reform; the growing importance of wireless service to all consumers; and crafting policy that properly balances federal and state roles in accomplishing these various goals. The task that the FCC has before it is formidable. Rate Counsel commends the FCC for seeking to develop coherent, fiscally responsible policy that will replace the existing fragmented and illogical array of federal policies and programs with

² / *In the Matter of Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, rel. February 9, 2011 (“NPRM”).

an integrated one that positions the United States to deploy a ubiquitous, broadband-capable network with services offered by diverse suppliers at affordable rates, while minimizing the burden on consumers, who must pay for the USF.

Comments support comprehensive reform, but, not surprisingly, diverge on various matters (the appropriate speed for transitions, the level of support that providers should receive for existing voice services during the transition to the broadband Connect America Fund (“CAF”), the identical support rule, whether it is acceptable to have a temporary “urban/rural” divide with respect to broadband upload/download speeds in order to control costs, how much (if at all) end user rates should increase as implicit subsidies are removed from interstate and intrastate access charges, etc.). In order to achieve progress, the FCC will need to make some tough decisions because consensus likely will not emerge for many of the issues that the NPRM encompasses.

The elimination of high cost support is long overdue, and, therefore, Rate Counsel urges the FCC to implement reform in a timely manner. With a national penetration rate of 96%, clearly the national goal of universal service for voice service has been achieved for all except low-income households.³

³ / Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Telephone Subscribership in the United States (Data through July 2010)*, rel. May 2011, at Table 4. The Lifeline/Link Up Programs, however, are essential to address the income-based gap in penetration, which the FC’s data clearly demonstrates (for example, the penetration for the highest income bracket is 99.0% and the penetration rate for the lowest income bracket is 89.5%). *Id.* The FCC is separately examining proposed reforms to the Lifeline/Link Up Programs. *Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link Up*, WC Docket No. 03-109, Notice of Proposed Rulemaking, rel. March 4, 2011 (“Lifeline/Link Up NPRM”). See Rate Counsel comments submitted April 21, 2011 and May 10, 2011 in the Lifeline and Link Up proceeding; Rate Counsel also intends to submit reply comments in the Lifeline and Link Up proceeding on May 25, 2011.

III. REPLY TO SELECTED ISSUES

Rate Counsel concurs with comments that support a freeze on high cost-support.

Rate Counsel concurs with the comments that support an immediate freeze on high-cost support, as well as proposals to institute a per-line cap.⁴ Unwarranted support inappropriately places a burden on consumers, who ultimately foot the bill for high cost support.⁵ Rate Counsel also agrees that the FCC should eliminate the identical support rule.⁶

In considering the need for subsidies, the FCC should consider all relevant revenues.

Rate Counsel has submitted detailed analyses and filings previously to the Commission demonstrating that incumbent local exchange carriers fail to assign and allocate sufficient portions of fixed and common plant to their unregulated operations, with the result that carriers depict a misleading view to federal and state regulators of the financial status of their regulated operations. The FCC should correct the flawed separations factors *before* it embarks on ICC reform. Furthermore, particularly in the absence of any imminent solution to the flawed accounting factors that the FCC now uses, it is essential that, in determining the need for any USF support, the FCC consider all available revenues associated with the telecommunications plant that is being subsidized.⁷

Rate Counsel concurs that the Commission should re-evaluate the existing contribution mechanism for USF support.

⁴ / Massachusetts Department of Telecommunications and Cable (“Massachusetts DTC”), at 9-10 (urging, at 10, among other things, the Commission “to implement a cap considerably lower than the \$3,000 proposed in order to realize a real and effective constraint on high cost fund growth”).

⁵ / *Id.*, at 10, 12.

⁶ / *See, e.g.*, AdHoc Telecommunications Users Committee (“AdHoc”), at 38.

⁷ / *See* AdHoc, at 9, 51-53 (observing, among other things, that the ARMIS reports reflect misallocations and therefore understate actual earnings); Comcast Corporation (“Comcast”), at 19.

Initial comments observe that voice-only revenues cannot be expected to provide ongoing support for broadband services,⁸ and that while the USF program has grown, the contribution base has been shrinking.⁹ Rate Counsel agrees, and, indeed, has been a long time proponent of implementing a universal service contribution assessment on broadband services. Of course, it would be far more straightforward to implement such an assessment if the FCC were to properly classify broadband services as telecommunications services. Rate Counsel concurs with XO Communications, LLC (“XO”) that the “problem has been exacerbated by policy decisions of the Commission to reclassify many previously assessable telecommunications services into non-assessable information services.”¹⁰

Similarly, “State Members recommend that the Commission broaden the federal universal service contributions base to include all services that touch the public communications network” and further state: “[b]y ‘public communications network’ we mean the interconnected communications network that uses public rights of way or licensed frequencies for wireless communications.”¹¹ Rate Counsel concurs with State Members that the USF surcharge should apply to all broadband services including digital subscriber line (“DSL”), cable modem service, and wireless service.¹² The FCC should correct the fundamental problem that it created by misclassifying broadband service. Furthermore, any federal USF assessment should of course

⁸ / See, e.g., Massachusetts DTC, at 16.

⁹ / XO, at 33.

¹⁰ / *Id.*, at 34.

¹¹ / Members of the Federal-State Board on Universal Service (“State Members”), at 118.

¹² / State Members, at 118. See also, AdHoc, at 11.

apply only to interstate services because, absent legislative change to the contrary, the FCC does not have the authority to assess intrastate services.

The USF should encourage efficient investment and operations.

Rate Counsel agrees with the FCC that the existing regulatory framework can result in investment decisions by carriers that are not necessarily in consumers' interests.¹³ As XO observes, "[b]y rewarding unnecessary investment, the current reimbursement formula for High Cost Loop Support ('HCLS') encourages gold-plating."¹⁴ The Commission notes that some components of the high cost program "do not provide incentives for controlling capital and operating costs,"¹⁵ and "may have the unintended effect of providing some carriers more support than is necessary to ensure reasonably comparable local voice service at reasonably comparable rates."¹⁶ As the Commission recognizes, the current rate-of-return regulatory framework equally supports well-run and inefficiently-run companies.¹⁷ Rate Counsel concurs with recommendations that the FCC reduce reimbursement rates substantially, and, indeed has proposed in the past that high cost support be eliminated as a condition of merger approvals, and also for all price cap local exchange carriers.

Numerous factors influence the cost of deploying and maintaining loops, and of course different geographies require different levels of support. However, consumers ultimately bear

¹³ / *NPRM*, at paras. 162, 171, 178, 179.

¹⁴ / XO, at 37. See also, AdHoc, at 19-22 (discussing, at 20, its recommendation that the FCC should eliminate high cost subsidies for carriers' corporate overhead "because such subsidies encourage wastefulness and inefficiency").

¹⁵ / *NPRM*, at para. 162.

¹⁶ / *Id.*, at para. 171.

¹⁷ / *Id.*

the cost of all such support. Whether support is for voice or for broadband, the FCC's reform should seek to encourage operational and managerial efficiency.

Local switching support should be eliminated.

Rate Counsel concurs with comments requesting the FCC to eliminate local switching support ("LSS") rather than phasing it out over a several-year period,¹⁸ and also concurs with the position that the FCC similarly should reallocate the entirety of the Interstate Access Support ("IAS") to the CAF in 2012.¹⁹ As AdHoc observes, the FCC initially set IAS funding levels for the five-year period of the CALLS plan,²⁰ and IAS recipients have not provided evidence that they need the support to provide affordable service.²¹

Accountability is an essential element of any universal service fund.

Any universal service fund, whether to support voice, broadband, schools, hospitals, or other purposes should include strong, clear measures for accountability. As stated by AdHoc, "the issue is whether the benefits of the High Cost Fund as currently specified, administered and supervised outweigh the economic loss that comes from taking money out of the economy through the interstate USF surcharge."²²

Long-term intercarrier compensation reform should not be accomplished by raising subscriber line charges, nor should the Commission overstep state jurisdiction of intrastate switched access charges.

¹⁸ / AdHoc, at 12-14 and Declaration of Susan M. Gately on behalf of AdHoc; Comcast at 13-14.

¹⁹ / AdHoc, at 32. See also, Comcast, at 14, supporting the elimination of the IAS.

²⁰ / AdHoc, at 32.

²¹ / *Id.*, at 33.

²² / *Id.*, at 3.

Intercarrier compensation reform should not encompass dollar-for-dollar replacement of reduced intercarrier compensation revenues, and the FCC should not adopt a special recovery mechanism that provides a “slush fund”²³ for carriers. Rate Counsel agrees with XO that “[n]either this Commission nor any State has any obligation to maintain revenue streams for carriers that are not rooted in a cost basis.”²⁴ Carriers need not be “made whole” as a result of the long-pending reform of intercarrier compensation.²⁵ Carriers have had ample notice of such reform. Furthermore, as Rate Counsel has stated previously, until the FCC corrects the flawed accounting factors that now apply, the FCC cannot assess accurately the relationship of carriers’ regulated costs and revenues.

Rate Counsel continues to oppose any increase in subscriber line charges, and, also opposes XO’s recommendation that the Commission remove the current caps on the interstate subscriber line charge (“SLC”).²⁶ FCC’s extension of the freeze on separations is misplaced and undercuts meaningful USF/ICC reform. The SLC, which is included on customers’ telecommunications bills, appears to customers to be a government-sanctioned charge, and, therefore becomes a too-easy vehicle for carriers to raise rates for consumers because, in the face of any consumer complaints, carriers can simply “blame” the government for the charge. As AdHoc explains in detail, raising the SLC is ill-advised,²⁷ and, furthermore, “[f]oisting this added and unjustified burden on business subscribers in the current economic environment while

²³ / XO, at 50.

²⁴ / *Id.*, at 47.

²⁵ / AdHoc at 42, 49-53; Comcast, at 19.

²⁶ / XO, at 7; see also Comcast, at 20.

²⁷ / AdHoc, at 56-62.

the RBOCs are earning excessive returns would be unjustifiable, to mention completely at odds with current government efforts to assist businesses facing the worst economic downturn in decades.”²⁸ Moreover, in many jurisdictions, carriers already possess the authority to raise rates for basic service. For these various reasons, not only is there no need to raise the SLC, but also it would be unwise public policy that would unfairly burden consumers.

Rate Counsel concurs that, both for legal and policy reasons, the Commission should not seek to override state access charge policy and ratemaking,²⁹ and, therefore disagrees with those comments that would have the Commission apply Section 251(b)(5) to intrastate traffic.³⁰ Concern that the patchwork of intercarrier compensation rates could persist indefinitely³¹ does not justify the FCC overstepping its jurisdictional boundary. The distinct roles of states and the FCC are well established.³² The FCC lacks authority to set reciprocal compensation rates or intercarrier compensation rates for intrastate services.

Although Rate Counsel supports the evolution of the network from time-division multiplexing (“TDM”) to one based on Internet protocol (“IP”) interconnection facilities, compensation for IP traffic should not be set differently from that for TDM-based traffic.

Some initial comments propose that the FCC’s intercarrier compensation policy promote all-IP networks, by for example, immediately reducing rates for IP termination.³³ Although Rate Counsel supports the evolution of the network from one that relies on TDM to one that relies on

²⁸ / *Id.*, at 62.

²⁹ / *See, e.g.*, Massachusetts DTC, at 19-21.

³⁰ / *See, e.g.*, XO, at 12; Comcast, at 5.

³¹ / XO, at 13.

³² / *See* MetroPCS California, LLC v FCC, decided May 17, 2011 (Appeal No. 10-1003).

³³ / *See, e.g.*, XO, at 9-11; Google, Inc. (“Google”), at 6; Comcast, at 4.

IP interconnection facilities, compensation for IP traffic should not be set differently from that for TDM-based traffic. All traffic, regardless of the technology used, should be treated similarly. Rate Counsel, however, supports comments that urge the Commission to confirm that terminating carriers must interconnect and accept traffic on an IP basis.³⁴ Carriers can negotiate bill-and-keep arrangements, but, contrary to the recommendations of some, the FCC should not mandate bill-and-keep.³⁵

The FCC should classify VoIP as telecommunications service.

Rate Counsel concurs with initial comments asserting that the FCC should classify VoIP as a telecommunications service, which would facilitate the support of broadband service.³⁶

Rate Counsel supports the re-assignment of high cost support to the new CAF.

Rate Counsel concurs with XO's recommendation that the FCC should complete the transition from high cost support to USF support to the new broadband CAF "with the minimum delay."³⁷ Others support the Commission's proposal to transition high cost funds to the new CAF.³⁸ However, contrary to the views set forth in some comments,³⁹ Rate Counsel opposes the use of a reverse auction process, and reiterates its support for a procurement process.⁴⁰ Although Rate Counsel supports a procurement process, as a second-best solution, Rate Counsel would

³⁴ / XO, at 20.

³⁵ / See, e.g., XO, at 23-24; AdHoc, at 43-48; Google, at 9 (recommending a transition by 2015 to bill-and-keep for all traffic and technology).

³⁶ / State Members, at 19; National Association of Regulatory Utility Commissioners ("NARUC"), at 5.

³⁷ / XO, at 42.

³⁸ / See, e.g., AdHoc, at 31.

³⁹ / See, e.g., XO, at 43-46; Comcast, at 16.

⁴⁰ / See also, National Association of State Utility Consumer Advocates ("NASUCA"), at 84-85.

support State Members' recommendation for state-supervised grants, but such grants should be available to all states.⁴¹

Furthermore, the FCC should structure the CAF so that municipalities can receive CAF subsidies to deploy broadband.⁴² There is an unfortunate history of telecommunications and cable companies challenging municipalities' ability to deploy broadband service, and, therefore, affirmative FCC rules and policy are essential to ensure that municipalities' efforts to bring broadband to unserved areas are not thwarted by industry.⁴³ The telecommunications and cable industries possess far greater lobbying and legal resources than do municipalities, and, for this reason, unambiguous federal policy that ensures that communities "are eligible to receive the same support available to commercial providers"⁴⁴ is essential to facilitate the initiatives of towns and cities that seek to bring themselves into the 21st century. Rate Counsel concurs with Commissioner Copps:

My colleague Commissioner Mignon Clyburn has been highlighting the importance of municipal broadband as an important tool to address the digital divides in our country. As most of you know, I have been pushing municipal broadband for a long, long time. When incumbent providers cannot serve the broadband needs of some localities, local governments should be allowed--no, encouraged--to step up to the plate and ensure that their citizens are not left on the wrong side of the great divide. So it is regrettable that some states are considering, and even passing, legislation that could hinder local solutions to bring the benefits of broadband to their communities. It's exactly the wrong way to go. In this

⁴¹ / State Members, at 78.

⁴² / New America Foundation, Consumers Union, and Media Access Project ("Public Interest Commenters"), at 3.

⁴³ / See, e.g., North Carolina House Bill 129, which would tie the hands of municipalities seeking to deploy broadband, which has passed both chambers of the General Assembly and is awaiting the Governor's signature. <http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H129v6.pdf>

<http://arstechnica.com/tech-policy/news/2011/05/op-ed-north-carolina-broadband-bill-would-eliminate-level-playing-field.ars>; <http://www.newsobserver.com/2011/05/06/1178613/legislature-at-last-approves-broadband.html>.

⁴⁴ / Public Interest Commenters, at 4.

context, too, our previous infrastructure challenges must be the guide. The successful history of rural electrification, as one example, is due in no small part to municipal electric cooperatives that lit up corners of this country where investor-owned utilities had little incentive to go. Those coops turned on the lights for a lot of people! You know, our country would be a lot better off if we would learn from our past rather than try to defy or deny it.⁴⁵

Rate Counsel concurs in part with Google that the CAF should be used primarily for initial broadband deployment costs, that revenues from broadband-based services “should be adequate to wean carriers from reliance on publicly-funded government subsidies” and that *subsequently* CAF subsidies can and should be shifted to demand-side issues.⁴⁶ Rate Counsel disagrees with Google’s proposed sequence, however, and urges the Commission to move forward simultaneously on both supply-side and demand-side issues, rather than first addressing deployment issues as Google seems to suggest.

Furthermore, Rate Counsel supports the imposition of reasonable conditions associated with broadband subsidies from the CAF. Among other things, Rate Counsel supports Public Interest Commenters’ recommendation that the FCC impose open Internet obligations on those providers that receive broadband support.⁴⁷ Also, CAF recipients should not only offer wholesale access to broadband networks at reasonable rates, terms, and conditions, but also they should be required to offer broadband service on a standalone basis.⁴⁸

⁴⁵ / Remarks of FCC Commissioner Michael J. Copps, SEATO 10th Annual conference, Asheville, North Carolina, May 10, 2011 <http://beta.fcc.gov/document/copps-seatoa-10th-annual-conference-remarks>

⁴⁶ / Google, at 13. *See also*, Google, at 16-17. *See also* Comcast, at 16, positing that CAF support requirements should decline as the construction of broadband networks is completed.

⁴⁷ / Public Interest Commenters, at 4.

⁴⁸ / Google, at 17.

Rate Counsel agrees with Google that “USF reform should leverage the unique contributions that states can offer” and that “states are likely the best source of data about the status and deployment of broadband infrastructure.”⁴⁹

CAF support should be distributed in an equitable manner.

Affordability and deployment are two major barriers to broadband adoption. Rate Counsel has previously asserted that broadband subsidies should be distributed in proportion to states’ populations. Some states may include areas that are relatively more costly to serve and other states may include relatively higher quantities of consumers who cannot easily afford broadband service. As an alternative to distributing federal broadband support based on states’ populations, Rate Counsel supports the proposal of the Massachusetts DTC that the Commission “consider establishing a formula for calculating the level of CAF support for each state based on a percentage of that state’s contribution of the Fund.”⁵⁰

Ultimately, consumers bear the burden of paying for any USF, and, therefore, it is essential that the FCC incorporate accountability into the CAF, ensure that funds are only spent where it is essential to do so, and design and implement the program so that its purpose is to benefit consumers, not carriers.

The existing high cost support programs and the proposed CAF are designed to provide subsidies to carriers so that they can provide affordable service to consumers. Although consumers are the intended beneficiaries, carriers act as the “go-between,” collecting monies from all consumers in order to be able to offer more affordable service to a subset of consumers. Consumers are not only the intended beneficiaries, but also, they foot the bill for the program.

⁴⁹ / *Id.*, at 18.

⁵⁰ / Massachusetts DTC, at 12.

Therefore it is essential that carriers be held accountable for the subsidies that they receive,⁵¹ or, in the alternative, that consumers receive the broadband subsidy directly. The FCC has a parallel proceeding in which it is seeking to minimize inefficiencies in the Lifeline/Link Up programs.⁵² The FCC should apply at least the same level of scrutiny, if not more, to the high cost program and to any new CAF that is established as it is applying to the Lifeline/Link Up programs. Under the existing high cost program, if companies spend more money, they receive more USF support, but, by contrast, a low-income household that spends more money on telecommunications services may not then obtain higher subsidies from the Lifeline Program.

III.CONCLUSION

Rate Counsel urges the FCC to adopt rules consistent with the recommendations set forth in these reply comments, Rate Counsel's initial comments, and the numerous prior Rate Counsel comments, which are identified in Rate Counsel's initial comments. Furthermore, regardless of the decisions that the FCC makes, the FCC should ensure that such decisions are consistent with the dual roles of the state and the FCC. Furthermore, any policy decisions rendered in this proceeding should be based upon sound reasoning and analysis; the reasoning and analysis for any decisions should be clearly articulated; and the decisions should be based on the evidence in the record. Rate Counsel commends the FCC for seeking to resolve thorny, long-brewing matters, and is hopeful that the FCC will do so without further delay.

⁵¹ / See AdHoc, at 40-41.

⁵² / *Lifeline/Link Up NPRM*.

Respectfully submitted,

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